

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>ANGELA CHAIREZ</b>	)	
Claimant	)	
VS.	)	
	)	
<b>IBP, INC.</b>	)	Docket No. 181,994
	)	& 181,995
Respondent	)	
Self-Insured	)	

**ORDER**

Claimant appeals from a Decision rendered by Administrative Law Judge Thomas F. Richardson on August 8, 1995. The Appeals Board heard oral arguments on January 4, 1996. Jeff Cooper has been appointed Appeals Board Member Pro Tem for this particular case to serve in place of Board Member Gary Korte who recused himself from this proceeding.

**APPEARANCES**

The claimant appeared by and through her attorney, Stanley R. Ausemus of Emporia, Kansas. Respondent, a qualified self-insured, appeared by and through its attorney, John David Jurcyk of Lenexa, Kansas. There were no other appearances.

**RECORD AND STIPULATIONS**

The Appeals Board has reviewed the record and adopted the stipulations listed in the Decision. Although this case bears two docket numbers, it has been treated as one accident by the parties and by the Administrative Law Judge. The Appeals Board will, therefore, likewise treat this as one claim.

**ISSUES**

The sole issue to be considered on appeal is the nature and extent of claimant's disability.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the record and considering the arguments of the parties, the Appeals Board finds that the claimant has suffered a 5 percent permanent partial general body disability as a result of accidental injury arising out of and in the course of her employment.

Claimant met with personal injury on May 20, 1993, when she bent over to pick up meat that had fallen into a tub. The claimant had immediate pain in her low back. She reported the injury to the company nurse. Claimant continued working her regular job and received conservative treatment from the dispensary.

The claimant gave notice that she wanted to terminate her employment with the respondent for personal reasons. The notice of intent to terminate was signed by the claimant on August 12, 1993. Her last date of work for the respondent was August 14, 1993. Her reason for terminating her employment with respondent dealt with personal problems and had nothing to do with her injury. As of August 14, 1993, the claimant was still performing her regular work without restrictions.

On August 16, 1993, she bent over at home after taking a shower and suffered an acute episode of low back pain. The claimant was seen by her physician, Myron J. Zeller, M.D., and his records clearly reflect a history of injury at home on August 16, 1993. Dr. Zeller indicated in his report of September 26, 1994, that the acute injury of August 16, 1993, was not related to the May 20, 1993, injury at work.

Following the incident of August 16, 1993, the claimant attempted to retract her termination request. The claimant testified that her personal problems had resolved and she wanted to remain working for the respondent. The attempted retraction was refused by the respondent, and the claimant's employment was terminated. The claimant received treatment by Dr. Zeller, her general physician, and by Dr. Michael J. Baughman, an orthopedic physician. Dr. Baughman was designated by Administrative Law Judge Richardson as the authorized physician at a preliminary hearing held on June 21, 1994. Dr. Baughman's report dated July 26, 1994 listed the complaints he was given by claimant as cervical neck pain and lumbar spine pain. Dr. Baughman ordered x-rays, which were within normal limits, and rendered a diagnosis of degenerative disc disease. Dr. Baughman rated the claimant as having 5 percent permanent partial impairment to the body as a whole attributable to cervical degenerative disease and 5 percent permanent partial impairment attributable to degenerative disc disease of the lumbar spine.

Dr. Zeller also provided treatment for the claimant. Dr. Zeller indicates in his records, which were admitted by stipulation, that the job claimant was working when she voluntarily left the employment with respondent was well within her restrictions. On September 15, 1993, Dr. Zeller released claimant to full duty.

The record does not reflect any mention of neck pain until after the August 16, 1993, injury at home. Dr. Zeller's notes from August 17, 1993, indicate only complaints of low back pain. Dr. Zeller's notes through September 15, 1993, do not reflect any complaints of neck pain either.

The claimant was also seen by Dr. Aly M. Mohsen at the request of her attorney on September 8, 1994. Dr. Mohsen rated the claimant at 18 percent permanent partial impairment to the body as a whole. Dr. Mohsen, a physiatrist, diagnosed the claimant with progressive degenerative joint disease with facet arthropathy and facet hypertrophy of the cervical spine, secondary to cumulative trauma disorder; super imposed myofascial pain syndrome to the cervical and lumbar spine with associated scapulocostal and multi fundus triangle syndrome; decussated disc syndrome C5-C6, C6-C7; and bilateral trochanteric bursitis and tendinitis. The evidence is not persuasive that all of Dr. Mohsen's findings are attributable to her work-related injury of May 20, 1993. Since there were no cervical complaints until after the shower incident of August 16, 1993, many of Dr. Mohsen's findings undoubtedly are related to the shower incident and not the work-related injury.

The credible evidence shows that the claimant continued to work in a job within her restrictions until she voluntarily terminated her employment with respondent. K.S.A. 1992 Supp. 44-510e(a) provides in part:

"There shall be a presumption that the employee has no work disability if the employee engages in any work for wages comparable to the average gross weekly wage that the employee was earning at the time of the injury."

Claimant has not presented evidence sufficient to overcome the presumption that she is not entitled to a work disability in excess of her functional disability. While the presumption is rebuttable, the Appeals Board finds the evidence supports a finding that in this case the continued application of the presumption of no work disability is warranted. The presumption has not been overcome. Locks v. Boeing, 19 Kan. App. 2d 17, 864 P.2d 738 (1993). Dr. Zeller indicated claimant could return to regular duties and Dr. Baughman did not place restrictions on the claimant. The claimant's work loss was solely attributable to her voluntary termination with the respondent. Claimant is limited to a disability award based upon her percentage of functional impairment only.

### **AWARD**

**WHEREFORE**, it is the finding, decision and order of the Appeals Board that the Decision of Administrative Law Judge Thomas F. Richardson, dated August 8, 1995, should be, and hereby is, affirmed.

**AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR** of the claimant, Angela Chairez, and against the respondent, IBP, Inc., a qualified self-insured, for an accidental injury which occurred on May 20, 1993, and based upon an average weekly wage of \$405.42, for 415 weeks of compensation at the rate of \$13.51 per week for \$5,606.65, for a 5% permanent partial general body disability, making a total award of \$5,606.65.

As of October 31, 1996, there is due and owing claimant 180 weeks of permanent partial disability compensation at the rate of \$13.51 per week, in the sum of \$2,431.80, which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of \$3,174.85 is to be paid for 235 weeks at the rate of \$13.51 per week until fully paid or until further Order of the Director.

Future medical benefits will be awarded only upon proper application to and approval of the Director. Unauthorized medical expense of up to \$350 is ordered paid to claimant upon presentation of proof of such expense.

Claimant's attorney fee is hereby approved insofar as it is not inconsistent with K.S.A. 44-536. Fees necessary to defray the expense of the administration of the Workers Compensation Act are hereby assessed against the respondent to be paid direct as follows:

Underwood & Shane	
Transcript of proceedings	\$180.50
Underwood & Shane	
Transcript of proceedings	\$ 88.00
Underwood & Shane	
Deposition of Doug Bolton	\$237.00
Underwood & Shane	
Deposition of Minh Duong	\$216.00

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of October 1996.

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BOARD MEMBER PRO TEM

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BOARD MEMBER

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BOARD MEMBER

c: Stanley R. Ausemus, Emporia, KS  
John David Jurcyk, Lenexa, KS  
Craig Posson, IBP, Inc., Dakota City, NE  
Kenneth Johnson, Administrative Law Judge  
Philip S. Harness, Director